72-1629

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1972

No. 72-1629

DAVID E. BLUETT, Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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The Petitioner herein, David E. Bluett, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 15, 1973, and supplemented by the Order and Opinion of the Fourth Circuit entered on April 4, 1973, related to the Petition for Rehearing, all of which affirmed Petitioner's conviction for alleged importation of falsely made or altered obligations ("stolen money orders"). (Count One, Title 18, U.S.C., Sec. 472), their alleged possession and concealment (Count Two, Title 18 U.S.C., Sec. 473), their transfer and receipt (Count Three, Title 18, U.S.C., Sec. 542), and their receipt and conversion (Count Five, Title 18, U.S.C., Sec. 641).

The original eight page Opinion and Judgment of the Court of Appeals, reprinted in the Appendix as App. 1-8, is listed in 474 F.2d 1343 as an unpublished March 15, 1973 Opinion affirming the conviction in the District Court. The three page supplemental opinion "Order" on the Petition for Rehearing and Other Relief, dated April 4, 1973, is reprinted in the Appendix, (App. 9-11). It is not known whether they will be published in official reports in view of the as-yet "unpublished" reference in 474 F.2d 1343.

JURISDICTION

The Judgment of the Court of Appeals of the Fourth Circuit was entered on March 15, 1973 (App. 20).

A timely Petition for Rehearing and/or Rehearing En Banc was thereafter filed, after which the Court of Appeals, while denying those Petitions, issued a supplemental opinion (termed an "Order") on April 4, 1973.

Upon timely application, the Chief Justice of the United States, on May 4, 1973, ordered that the time for filing this Petition for Writ of Certiorari be extended for 30 days, to and including June 4, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1), and Rule 22(2).

QUESTIONS PRESENTED

1. Whether, as the Fourth Circuit in this Court held, the Federal statutes here involved, Title 18 U.S.C., Secs. 472 and 473, may justify criminal charges in cases of United States postal money orders, or whether, as the Ninth Circuit has indicated, criminal charges involving United States postal money orders must be brought under 18 U.S.C., Sec. 500 only.

2. Whether, in a Federal prosecution involving an alleged specific intent, the Court is required to instruct the jury, upon request, that carelessness, negligence, or nonfeasance, where shown by the defense evidence, is a proper defense to charges of this kind requiring specific intent, in order that a defendant's right to have a jury fairly consider his prime defense, or theory of innocent intent, is preserved.

3. Whether or not, in a Federal prosecution, where a sealed mailed package allegedly sent by or on behalf of an overseas civilian, is mailed to this country, and where the Government conceded it had no probable cause to inspect the package for contraband, and where there was no intentional relinquishment of a known legal right, there are still sufficient Fourth Amendment protections which cannot be overridden either by alleged customs or postal regulations, which required the suppression of the vital seized evidence at bar.

4. Whether the previous interpretation of Federal Criminal Rule 8a, rendered by this Court, making that rule "mandatory" in cases of different offenses on different dates did not bar the joint prosecution of the charges at bar, involving alleged theft of stolen money orders and possession of marijuana, once the motion attacking that misjoinder was made.

5. Whether the trial Court, in failing to grant the Motions for Judgment of Acquittal made, extended venue requirements in a Federal prosecution beyond that which is permissible, in that there was insufficient proof of dominion for there to be possession or retention of the package at all in the State of Maryland, or where there was clear, direct, and contradictory inconsistency and repugnancy in the guilty verdicts, where the jury's acquittal of the defendant on the false declaration charge in Count Four, had all the elements of the remaining charges, upon which guilt was found.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Set forth in the Appendix to this Petition are the pertinent constitutional provisions, statutes and rules herein They are The Constitution of the United States, Amendments IV, V and VI; and United States Code, Title 18, Sections 2, 3, 8, 471, 472, 473, 500, 542 and 641, and Federal Rules of Criminal Procedure, Rules 8 and 14. See Appendix, 12-19.

STATEMENT OF THE CASE

Mr. Bluett was a civilian working in Vietnam who was arrested on October 14, 1970 on federal charges related to stolen money orders. He was later indicted on a series of Counts which were dismissed, with the present Counts involved here, superseding those prior charges.

The present eight Count indictment at bar, filed on March 23, 1971, charged Mr. Bluett with two sets of charges related to stolen money orders and marijuana, occurring on two separate dates, October 14, 1970 and October 20, 1971 (R. 1; 5-12). The October 14 money order Counts (One through Five), charged violations under Title 18 U.S.C., Secs. 472, 473, 542 and 641, allegedly asserting the illegal importation, transfer, receipt, false declaration, and possession of falsely made, forged and altered "securities" and possession of stolen property with intent to defraud; and aiding and abetting were also charged. (R. 1; 5-9 for money order Counts One through Five).

The October 20 marijuana charges deal with possession and concealment or receipt, and failure to declare marijuana (Counts Six, Seven and Eight; R. 8-12).

The marijuana was allegedly obtained in Vietnam. The events of all Counts are charged as occurring "in the State of Maryland." (R. 5-12).

The money orders, 188 in number and alleged to be stolen, were in fact dated May 15, 1969; later evidence, by stipulation, showed that they had been stolen in January and March of 1969 from a Buellton, California post office (R. 34). This was more than 18 months before the date of the events here.

The false declaration charged in the money order Counts, allegedly occurred on August 21, 1970; the false declaration noted in the marijuana Counts was ten days later, August 31, 1970 (R. 8; R.12; Counts Four and Eight).

All of Mr. Bluett's pretrial motions, that for separate trials and that to suppress the evidence, were promptly denied. When they were renewed, just prior to trial, they were again denied (R. 2).

During the course of the trial proceedings, his Motions for Judgment of Acquittal, both at the close of the Government's evidence and at the close of all evidence made by his then counsel, were denied (R. 3).

The testimony beginning on May 10, 1971, including that of Mr. Bluett and his witnesses, continued until the verdict of guilty as to four Counts on May 17, 1971, one week later. The jury acquitted Mr. Bluett of the false declaration charge in Count Four, and also acquitted him of all three marijuana Counts (R. 3; R. 59).

Mr. Bluett's post-trial motion to set aside the verdict on the grounds already urged, as well as inconsistency of the verdict (the acquittal on the false declaration charge causing that claim), was unsuccessful. (R. 3).

After a "4208b" commitment, Mr. Bluett was formally sentenced on February 1, 1972 (R. 4; r. 60).

With no prior "record" present, and for [illegible] obvious reasons, the Court thereupon sentenced the defendant to three years, duly suspended. (R. 60, 61; R. 4).

Six days after sentencing, on February 7, 1972, Mr. Bluett timely filed his Notice of Appeal (R. 62; R. 4).

His conviction was affirmed by the Court of Appeals in the Opinions noted in this Appendix, and with respect to which this Petition is filed. (App. 1-11).

Stating the pertinent evidence in this case, in its least favorable light to Mr. Bluett, as he is compelled to do on this Petition, it may be simply put as follows: Mr. Bluett was a civilian employee in Vietnam from February 8, 1969 through September 11, 1970, and was employed in the Saigon Operations of IBM's Federal Systems Division at that time (R. 38, Stipulation). It is undisputed that a Vietnamese "girl friend," one Miss Hoa, lived with him; it appears that during his stay in Vietnam he became aware of the fact that some items, which he claimed were left with him by a "friend" (a Mr. Sciolto), were blank money orders; he contacted a Lt. Naysnerski, an official in charge of postal matters, to inquire about these money orders; while Naysnerski cast great doubt on their validity because the then existing color of money orders seemed different from those Mr. Bluett asked about, and while he further suggested the probability that not only may they have been counterfeit, but also one was not supposed to have them at all in Vietnam --- nonetheless, he checked his records, or had them checked, and gave Mr. Bluett no information they were stolen. It does not appear that the money orders, stolen by someone in January, 1969, in Buellton, California, in fact, had any value at all.*

The testimony regarding the marijuana charges rested on a number of defense witnesses, including Mr. Bluett, with overlap of their cross-examination on these matters into the money order charges.

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* Transcript references in this Statement are: Tr. 184-186; 198-208; 254-264; 375-396; 214; 361-375; 210; 218; 260-266; 296; 335; 339; 43;164; 165; 418; 483.

The Government's case on the marijuana charges thus relied on the seizure after arrest, and impeachment of Mr. Bluett's explanations, and those of his witnesses, as to his unawareness of the marijuana which was either in a canister, or apparently in the apartment long before he was, or was placed there by someone else.

On the other hand, as to the money orders, the Government had direct evidence favorable to it from its rebuttal witness, also a civilian employee in Vietnam. That witness, the selfsame Mr. Sciolto, at first denied Bluett's contention that it was he (Sciolto) who left anything like money orders with Bluett; but then returned to the stand in the Government's case to imply that he and Mr. Bluett were somehow acting together in a scheme.

In short, we can certainly assume that if some part of Mr. Sciolto's testimony is accepted, although conceded by the Government to constitute two different sworn statements, there was in fact sufficient evidence to show an alleged conscious knowledge by Mr. Bluett of the fact the money orders he had were stolen, possessed, and discussed with Lt. Naysnerski, long before, and further to show his awareness of, and participation in, an alleged wrongdoing. (For this Petition, and its legal issues, as we shortly note, these facts as "supportive" of a jury verdict, simply do not bear on the questions noted).

Mr. Bluett's defense, apart from legal questions, rested almost entirely on the testimony of Lt. Naysnerski and Miss Hoa as to the money orders, and upon Miss Hoa and his other witnesses, such as one Davis, to show the credibility of his claims regarding the marijuana Counts.

That the marijuana was found is clear and not in doubt. Similarly, the stipulation of facts, freely entered into here, reflects a large area of undisputed fact, as to the money order Counts. (R. 34, 35, 38).

In short, many surrounding facts on both sets of charges are conceded.

One of Mr. Bluett's basic points in this cause is that he was prevented from establishing his prime and perhaps

sole theory of defense by way of instructions refused and others given, and thus also prevented from effective jury argument of his defense. For that reason, we state here his theory of innocence.

Mr. Bluett's basic defense related to his Vietnamese girl friend's testimony --- to what she did, how she gathered together some of his effects, packed his goods, then filled the parcel, and how he had no knowledge that the money orders were wrapped by Miss Hoa and placed in the crate by her that was finally packed, sent and mailed to the United States. His conscious knowledge of what was packed, he claimed, did not include these items; and Miss Hoa's testimony supported that position. His sole understanding of what was packed is reflected in what appeared on the customs declaration he signed, or in what he assumed Miss Hoa had prepared, packed and done. (Tr. 214; 361; 375-376).

We have noted these latter facts only to emphasize what the defense presented as its theories of innocence in order that it may appear that there is a factual basis for those legal issues raised which would require that basis.

The packages, with Mr. Bluett's return address, were sent on August 21, 1970 to a Mr. and Mrs. Ramon Deily in Baldwin, Maryland, friends of Mr. Bluett, who were to receive and hold the parcels until he picked them up (Stipulation of Facts, R. 34, 35).

The seizures at the Deily home in Maryland, were made after customs and postal officials in California and Baltimore opened the packages involved, made an extensive search based upon allegedly finding certain gun parts which led to the money orders, resealed the packages, delivered them to the Maryland post office, and sent them on to the home of Mr. and Mrs. Deily (Tr. 23-34; Stipulation of Facts).

The affidavits and search warrants, which form one legal aspect of the case, were apparently executed in Maryland after first, the packages were reseeled in California and sent to Maryland, and in fact, after the arrest of Mr. Bluett in Arlington, Virginia (Ct.App. App. 50-56; Aff. & Warr; Tr. 164-165).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With Another Circuit Court Ruling And Interpretation of the Federal Criminal Statutes Involved.

In its subsequent Opinion, styled an "Order", and dated April 4, 1973, issued as a consequence of the Petition for Rehearing, the Court of Appeals below stated that it was "aware" of Kniess v. United States, 413 F.2d 752 (9th Cir. 1969), but did "not include mention of it since we considered it inapplicable." (App. 9-10) 1/

1/ Of course that statement is a bit misleading. It implies that the Court failed only to mention the one case itself rather than the total "Kniess" point, raised below and here. In fact, the main Opinion of the Court did overlook the entire point in any part of its main Opinion. Except for one aspect of the determination on this Petition, it would serve no vital purpose to comment unduly on that initial failure of the Court of Appeals to discuss not only the Kniess issue, at all, but at least one other major issue, in its first Opinion, later noted in its "Order" on the Petition for Rehearing; nor even to underscore the rather odd and somewhat inaccurate explanation of the Court for failing to do so; nor even, in fact, as to why two Opinions, of thirteen pages in length, in matters of this kind, and involving federal statutory interpretations and prosecutions, will apparently go unpublished. That those are the facts, however, may be useful to this Court in assessing precisely how much deference can or should really be given to the presumed attention and acumen the Court of Appeals Opinions directed to the facts and legal principles in this case.

The "Kniess" contention made in the briefs below (the Court not calling for any oral argument) was that, under the reasoning and holding of that Ninth Circuit case, Mr. Bluett could not be prosecuted for any postal money order charges under Title 18, Sections 472 and 473, but that he had to be charged and prosecuted under Section 500 as to those money order Counts and that to the extent they were not encompassed with § 500, they could not be made. Furthermore, he pointed out and would emphasize here, that his jury was specifically instructed on the statutes charged. As it did with all the other Counts, the Court read the jury Sections 472 and 473 verbatim (Tr. 636-651). Section 500, never being charged, was never alluded to. And it was upon that basis, and those charging statutes, that the defendant was found guilty on four of the eight Counts.

The Court of Appeals stated that Kniess is "inapplicable" because it dealt with the passing and forging of money orders, rather than their importation (App. 9-11).

It happens that Kniess did deal with passing and forging, but that was of no consequence to the point then, nor is it now. The heart of the Kniess point we make concerns itself with the interpretation of the words "securities" and "obligations", or the phrase "obligation or other security of the United States", as noted in § 472 and § 473, and defined in 18 U.S.C., Section 8. (App. 14-15)

We maintain that those words in the historical context of their adoption and in the light of clear, evident Congressional intent, carefully and exhaustively noted in Kniess, could not and would not, at that time, or now, ever encompass postal money orders as items of "obligation or other securities of the United States." As Kniess noted, literalism is not a substitute for the historical antecedents which show that when Congress enacted § 471 - § 473, it never intended that postal money orders were items to be included within those statutes. Kniess is extremely helpful because it analyzes the predecessor statutes and predecessor laws. It points out, for example, tha

the postal money order system and criminal statutes dealing with postal money orders are of far more recent vintage than the older ones dealing with penalties for Treasury notes, bills and "obligations" or "securities" of the United States generally. It emphasizes that the penalties for postal money order violations, such as those in Section 500, are far different from the penalties in general "securities and obligations" statutes, such as §§ 471, 472 and 473 (up to 15 years for § 471 violations and 10 years for § 472 or § 473 violations, while § 500 charges involve a 5 year penalty). Historically, money orders were of small amounts --- originally $30.00, now perhaps $100.00. Congress clearly did not intend that violations of any kind whatsoever, in dealing with postal money orders, were to be treated in the same fashion as alleged criminal violations with respect to "securities" or "obligations" of the United States that may involve millions of dollars. So, too, as Kniess notes, the money order postal system and money orders themselves did not even exist at the time of like predecessors to § 8, § 472, or § 473. The beginning of §471-473 was 1790. The national postal money order system did not come into being until 1864. And when it did, the Revised statutes separated general frauds and passing and including importation from a separate chapter related to "postal crimes". (Kniess at 758). And even today postal money order frauds (of whatever kind) have always carried lesser penalties. (Kniess at 759).

In short, the decision in this case by the Court of Appeals simply does not meet the point, and wholly misapprehends it. The point is whether or not, by reference to history and the statutory scheme of forgery and fraud crimes (including importation) found in 471-473, and the separate postal crimes, Congress could have intended, by the phrase "obligations or other security of the United States", to include such items as postal money orders.

Section 8, which defines the phrase, expressly refers to specific items such as: "bonds, certificates of indebtedness, national bank currency, Federal Reserve notes" and a whole list of specific items, including "stamps" (18 U.S.C. Sec. 8, App. 14; and see 18 U.S.C. Sec. 501 dealing with postage stamps.) But nowhere does it refer to "postal money orders" or "money orders" in its coverage. And outside of Kniess, no case has made the proper and thorough historical analysis that conclusively shows the Congressional intent to treat money orders different from other items subject to criminal penalties. See also 22 Op. Atty. Genl. 42 (1898), noting that Section 8, in defining the terms "obligation or other security of the United States", and thereafter referring to very specific items of the kind just noted, was not intended to be a general statute of broad sweep, but rather was limited to its precise words and items.

To be sure, there is no reference to "importation" in the money order Section 500. That is wholly beside the point. It may be explained by the fact that Congress would not normally consider that money orders are items to be "imported", in any event, since they are of small denominations and customarily passed within the continental limits. But, even if that be deemed an omission from the postal money order scheme, it does not justify legislating by judicial fiat that the term "postal money orders" are included in the phrase "obligation or other security of the United States", when historical fact shows that cannot be the intent of Congress; when reason states that it simply cannot be, in the light of all that Kniess has analyzed; and when any examination of the penalty scheme and the evident Congressional purpose are given the slightest thought.

The function of a Court, in matters such as this, is to carry out the Congressional intent. That intent, historically and in fact, does not show that the later-enacted postal money order scheme, and indeed, the later-developed postal

money order system, was ever intended, at any time, to be incorporated within the already adopted general statutes in phrases, or like phrases, such as "obligation or other security of the United States", now specifically defined and limited to specific items in Section 8.

To save a conviction against David Bluett is not worth the price that is paid for now incorporating, by judicial legislation, all types of postal money order violations into 472 and 473 (and 471 as well), with their stronger and more extensive penalties and longer and indeed pre-postal money order history. It is an incorrect interpretation, arising from a most inappropriate judicial function.

With this conflict between two Circuit Court decisions as to the reach and meaning of important Federal statutes, we suggest that the Court should indeed grant the writ in this case. 2/

II. The Decision Below Affirms A Conviction Where The Defendant was Deprived of His Effective Defense, in Conflict With Principles Followed By This Court.

The second point that was overlooked and later considered, at least in some fashion, by the Court of Appeals in the supplemental opinion or "order" of April 4, deals with the contention of the defendant that he was deprived of a fair presentation of his defense on the vital issue of criminal intent, by the failure of the Court to instruct, as requested, that he

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2/ While in Kniess the Court also found that there were sufficient facts to sustain a plea of guilty to a § 500 violation, that result cannot obtain here. As we noted earlier, the Bluett jury was expressly instructed, verbatim on 472 and 473; § 500 was never charged; and the jury found a 472, 473 violation on those instructions.

would not be held criminally responsible on the basis of his failure to check the packages mailed by his girl friend, Miss Hoa, before they were sent. The initial Opinion of the Court of Appeals, of course, did not discuss the issue at all. Its supplemental "Order" on the Petition for Rehearing, states that "... the charge, taken as a whole, adequately instructed the jury of the necessary criminal intent required for conviction. Bluett's acquittal on the marijuana charges confirms this." (App. 14). Inevitably, a generalization of that kind requires some specificity. First, the defense to the marijuana charges was, in large measure, entirely different from the defense to the money order charges. The Court of Appeals has no basis, except in ad hoc rationalization, to make that bold assertion.

The issue is really whether the charge "taken as a whole" did afford the defendant his defense, and if it did not, whether it is the kind of issue warranting this Court's concern.

Of course, the charge to the jury must be viewed in the light of the evidence produced, the theory of the defense, and the requests made. We have already noted that the evidence produced showed that Mr. Bluett did not participate in the actual packing and mailing, in terms of the issues here. That was done by a girl friend with the assistance of some other Vietnamese. Further the evidence did show, unlike the marijuana, an awareness of the money orders at some earlier point, when he spoke to Lt. Naysnerski. The money orders were forgotten items so far as he was concerned. They were apparently already wrapped in some paper at the time of Mr. Bluett's leaving, put in the larger package to be mailed by his girl friend, who was unaware as to the nature of the items, and mailed. (See references supra, p. 6). Of course, and quite naturally to his defense, the customs declaration, signed by Mr. Bluett, made no mention of the items. The defense, then, was that here was a man permanently leaving Vietnam; his girl friend packed his effects; a forgotten package of old useless money orders was apparently put in his effects

by her unknowingly; Bluett did not participate or check the package; at best, Bluett was negligent or careless in failing to check the package before the mailing to correct her mistake or inadvertence; but for that negligence or carelessness, unlike the civil law, he would not be criminally responsible.

The defense was not an issue of an "inadvertence or mistake" on his part that was at the heart of the defense, and the requested instructions, but rather, that he could not be held criminally responsible for what amounted to specific negligence or carelessness in not fully examining and checking the package before it was mailed (Tr. 541, 567, 661, R. 52). That is the factual context in which the issue of a deprived defense to the jury arises.

To be sure, in one line of a lengthy instruction, the Court employed some standard language dealing with "inadvertence or mistake." (Tr. 177-178). However, it repeatedly emphasized, in the usual "boilerplate" instruction, that the defendant could be criminally responsible for "constructive possession", for the actions of those "in concert with him", for what "he knew or should have known", for what he "failed to do", as well as for what he did; and even that the "guilt of the defendant may be established without proof he did every act constituting the offense". (Tr. 177-178).

Not in any place in these instructions, as the Government has conceded, did the Court ever inform the jury, specifically as requested, that Mr. Bluett could not be held criminally responsible and did not have the requisite criminal intent necessary for a conviction under these statutes, if his only failure was that of negligence, carelessness, or failure to check the package before mailing.

It is, of course, fundamental that our entire system of criminal law largely rests upon the issue of criminal intent or mens rea. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, dealing with Title 18 U.S.C. Section 641 violations --- precisely one of those involved here.

So, too, is it fundamental to federal prosecutions that when the evidence "... presents a theory of defense and the Court's attention is particularly directed to it, it is reversible error for the Court to refuse to make any charge on such theory." Bird v. United States, 180 U.S. 356, 361, 21 S.Ct. 403. See also Calderon v. United States, 279 F.556, 558 (5th Cir.); Marson v. United States, 203 F.2d 904, 912 (6th Cir.); and Levine v. United States, 261 F.2d 747 (D.C. Cir.), and cases noted therein.

This Court has emphasized that one of the critical factors that will determine the depth of a constitutional deprivation to a fair trial will be the extent to which the integrity of the fact-finding or truth-finding process was impaired. Compare Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731; Tehan v. United States ex rel Shott, 382 U.S. 406, 86 S.Ct. 459; Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967; and Williams v. United States, 401 U.S. 655, 91 S.Ct. 1148.

To deprive a defendant of his defense in a jury case, by way of an instruction on his specific theory, particularly when it is at the heart of the case, and is necessary where he has made sufficient admissions that demand it, is no small matter.

Whatever academics may say about the jury system, every practicing trial lawyer who has sat at the defense table, knows the difference between tactical judgments and jury arguments he may attempt or make in generalities about what amounts to his view of the law and an argument which refers to the Court's instructions and rests on what it states is the law. When the Court instructs on a specific defense such as this, a defendant can prepare and try the case so that he will be able to argue with instructional support, something along these lines:

> "The Court will instruct you, in this case, that the defendant, Mr. Bluett, is not and cannot be found guilty if he were merely careless or negligent

in failing to do something, such as check the package to assure himself as to what his girl friend was doing or had done. He asks you to give careful heed to those Court instructions, for that is the law. In a civil case one is responsible for negligence and carelessness. The owner of a car, who fails to check it, even though driven by another, can be held liable. But that is not the case in criminal trials, as the Court will instruct you. Miss Hoa, who had no interest in the matter, and against whom there has not been the slightest suggestion of wrongdoing, may have packed those money orders unknowingly, by some inadvertence or mistake, because she did not realize what they were. And of course she would not be responsible. But neither would Mr. Bluett be any more responsible than she, even if you believe he would have recognized the money orders had he examined the package or supervised Miss Hoa, that he was negligent or careless in not doing so, and for that, he has no one but himself to blame. Under the instructions that this Court will give you, and which you are bound to accept as the law, Mr. Bluett cannot be convicted, if you find, as the evidence at most shows, that he merely failed to examine the packages or failed to supervise Miss Hoa to prevent her sending them, and in doing so, was negligent or careless."

Without elaborating on the thrust of that "argument", suffice it to say that, since it is not only improper to urge upon the jury that which the Court has not instructed, and since it is no less vital to a prime or sole defense of a defendant to be able to argue from the Court's instructions themselves --- the very heart and soul of the truth-finding process is indeed impaired when that defense is prevented in <u>both</u> instructions and the fair argument that is thereby made permissible in reliance upon them.

It is perhaps inappropriate to add that there is, on the undisputed record, substantial support for the proposition that the jury did indeed hold Mr. Bluett responsible on a theory of negligence or carelessness when we consider that it acquitted him of the false declaration charge (Count Four). He signed the declaration, which made no mention of the contraband. He did not participate in the packaging. It is, then, a fair inference that the jury could have held him responsible on a kind of respondeat superior or negligence basis for the wrongs on which he was convicted.

Obviously, this is not to say that the jury could not have disbelieved Mr. Bluett entirely.

It is to say that, in federal prosecutions at least, the denial of theories of defense and the prevalent use of boiler-plate instructions in their stead, is too significant and too important to remain unconsidered by this Court.

And the factual pattern here is sufficiently common, as most trial lawyers must know, to warrant the attention of this Court, if phrases like the "integrity of the truth-finding process" are not to continue to remain hollow, appellate abstractions divorced from the real world of criminal trials.

III. The Decision Below Sustains Violations of Fourth Amendment Rights In Sealed Packages Where There Is No Probable Cause For Seizure on Grounds That Involve Important And Significant Questions In Federal Cases.

The Court of Appeals Opinion states that Mr. Bluett was not entitled to suppression of the stolen money orders, even though there was no probable cause for their seizure, because of the fact that since they were coming into the country, they could be opened. The Court makes no mention of the fact that

this was an American citizen using an APO address. The Court of Appeals said that since the mail was fourth class and there was a postal regulation which authorized the opening of fourth class mail, the seizure was justified, and that was the case, even though it was a sealed package. (App. 7-8)

The Court of Appeals failed or refused to consider the vital case which was cited on this point, for the basic principles urged, namely Ex Parte Jackson, 96 U.S. 727, 733.

It was in this case, Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877 (1878) almost one hundred years ago, that the "first principles" applicable here were stated, and have never been impaired. There the issue was "letters and sealed packages". There is a difference, Ex parte Jackson noted, between letters and sealed packages and what is "open to inspection such as newspapers, pamphlets and other printed matter purposely left in a condition to be examined". Ex parte Jackson at 733 (emphasis added).

Now let us observe carefully what Jackson then said. Each word deserves underscoring.

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed

packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." 98 U.S. at 733. (Emphasis added).

If the Fourth Amendment protects us wherever we are when we deal with our Government; and if it is so, as we must all agree, that no mere regulation allowing the opening or seizure of our goods can supersede the Constitution; and if, as long ago stated in Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 872, all "letters and sealed packages" are immune from unconstitutionally unreasonable searches and seizures "wherever they may be"; and if as Ex parte Jackson also noted, no letter or "sealed package" can be subject to a Congressional law or administrative regulation except what is discernible from its outside (size and weight); if, we say, this is the law, then the logic that follows those principles compels one conclusion, and one only: (a) for letters and sealed packages, there must be a warrant upon probable cause before they may be opened; (b) if no warrant there must be circumstances that show probable cause but justify failing to obtain a warrant; (c) lacking these, if they are opened for customs purposes, and even assuming that the principles of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, and Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 are met, they cannot be admitted into evidence absent the kind of knowing, intelligent warning given in Miranda v. Arizona, 384 U.S. 436, 475, 490, 86 S.Ct. 1602, 1628, 1636, or intentional relinquishment of a known right noted in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, and cases following.

If this defendant is right that there are abiding Fourth Amendment rights in any "sealed packages", "wherever they may be"; if he is also right that the holding of Ex Parte Jackson, to the effect that Congress may not issue regulations which will

defeat Fourth Amendment rights, contrary to the holding in the decision below; and if he is also right that, at least in Federal prosecutions by Federal standards, there must be a specific, intentional relinquishment of a known constitutional right, then, this defendant urges that, that knowing waiver being absent here, and the regulations not supplying the necessary ingredient to justify the opening of his package without probable cause, he was entitled to suppression because of the very lack of those elements. Had he signed an express waiver on the customs declaration, we may have had a different question. Had he been given notice that his Fourth Amendment rights had been waived by the mailing of the sealed package, we would also have had a different question. Had he been physically present at a border with direct notice and warning, express and implicit, that goes with a physical crossing at a border, that too may be different. The Court of Appeals avoided the ultimate "waiver" questions, by never mentioning the basic premises of Ex Parte Jackson that really give rise to them. And they are not met or resolved either by United States v Van Leeuwen, 397 U.S. 24 90 S.Ct. 1029, or the cases cited below because each is either factually distinct, possesses probable cause, or simply does not consider the questions. They should be met here.

It is an issue, clearly framed by the facts of this case, which is of vital importance to many citizens subject to Federal prosecutions in like cases.

IV. The Decision Below Misconstrued Federal Rule 8a And Has Adopted An Interpretation Of The Misjoinder Question Contrary And In Conflict With Sound Principles And Decisions Of This Court.

The Court of Appeals did allude to the misjoinder question in its first Opinion. (App. 3-7). The vital issue here which warrants the grant of the writ, turns on whether or not what was said in McElroy v. United States, 164 U.S. 76,81,17 S.Ct.31,41,was meant, and whether this Court should continue to sanction a disregard of the mandatory requirements of Federal Criminal Rule 8a. McElroy said simply simply that where there is a misjoinder of this kind, it does not call for an exercise of discretion (164 U.S. at 81). Any reasonable analysis of the misjoinder decisions, including those cited below, reflects a repeatedly erroneous confusion between Rule 14 and Rule 8a. The issue of Rule 14 prejudice may be an important issue in some cases, where the mandatory aspects of Rule 8a do not apply, but prejudice is not, and has not ever been, the question where misjoinder is mandatorily prohibited. See McElroy, supra. Metheany v. United States, 365 F.2d 96 (9th Cir.). That is the case here.

We have two different kinds of matters involved --- stolen money orders taken in Buellton, California in 1969, and marijuana possessed in 1970. The Court of Appeals Opinion argues that the separate mailings on two different dates was part of a common scheme and thus it did not come within the operation of the mandatory 8a rule. Obviously, that flat view of the Court of Appeals swallows the entire rule: any two or more alleged criminal acts are part of a scheme --- the scheme to violate the law, and to commit criminal wrong-doings. But that does not mean that because a defendant is alleged to have committed two criminal wrong-doings at different times, that he can be charged under Rule 8a in the same indictment for both of them. Possession of marijuana

has nothing to do with possession of stolen money orders, unless they were taken in the same robbery or involved in the same event. The Court of Appeals argues that the evidence of one could be brought into the evidence in the trial of another. Those words are simply inaccurate. If the cases had been tried separately, the marijuana evidence could not have been brought into the trial of the stolen money order charge. They were in different packages, mailed on different dates, with separate and differently dated customs declarations. When both the alleged time and crime are different, no words will change the McElroy rule. It is tempting, but wrong, to sustain a conviction by stretching, extending, and, in the ultimate, obliterating not only the record but then the rule and strict principle which prohibits that result.

The scope of Rule 8a in situations of this kind, viewed with judicial restraint, ought to be considered by this Court once again.

V. The Decision Below Departed From Federal Principles In Other Areas Sufficiently Significant To Warrant The Grant Of The Writ.

While surely conceding that as to this portion of the Petition, the issues preserved and urged here, for consideration, do indeed more restrictively apply to the specific events of his case than his other questions presented, still petitioner does suggest that they involve not insubstantial federal questions.

First, as to a "venue" matter, there was no evidence in this case to support the "continuing offense" concept, because there was no evidence of dominion, possession, or retention in Maryland as to all non-importation Counts (Two, Three and Five). As to the "importation" charge, the uncontradicted evidence on Count One shows the bringing into this country took place in California. In short, all

Counts on which Mr. Bluett was "guilty" lacked proof of the place of offense as charged and found by the jury, and hence the Motion for Judgment of Acquittal should have been granted. Cf. United States v. Lember, 319 F.Supp.249, showing when like charges "ripen" and implicitly suggesting that the Government cannot, as here, create the place of offense by delivery of known contraband in a context such as this.

As to the inconsistency or repugnancy questions, while well recognizing that inconsistency is one of the attributes often allowed juries, and very few cases reverse on that ground alone, still it is important to note here that the jury did acquit Mr. Bluett on Count Four. That Count, after all, forms the heart of the specific intent and alleged wrong-doing by Mr. Bluett, if any existed at all. It happened before all others. It appears to include each and every essential element of the other Counts. In the light of this record, we do not believe the Government can show anything but sheer repugnancy between a conviction on Counts One, Two, Three and Five, and an acquittal on Count Four. This cannot stand.

CONCLUSION

For these various reasons, stated and implicit, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1367

United States of America,

Appellee,

versus

David E. Bluett,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Decided March 15, 1973

Before Haynsworth, Chief Judge, and Russell and Widener, Circuit Judges

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Edward L. Genn on Brief for Appellant; George Beall, United States Attorney, and John G. Sakellaris, Assistant United States Attorney, on Brief for Appellee.

App. 2

PER CURIAM:

David E. Bluett was charged in an eight-count indictment with importation, possession and dealing in false, forged and altered United States securities (counts 1 - 3); entry of goods by means of false statements (count 4); possession of stolen Government property (count 5); smuggling marihuana and aiding and abetting (counts 6, 7 and 8). Following a jury trial Bluett was found guilty on counts 1, 2, 3 and 5 and not guilty on counts 4, 6, 7 and 8. We affirm.

The charges arose out of a shipment to Baltimore, Maryland, of two parcels mailed by Bluett while he was working as a civil employee in Vietnam. The first parcel, mailed on August 21, 1970, was opened at Oakland, California, by a customs inspector who discovered 188 United States Postal Money Orders, all containing forged machine imprints, forged validation stamps, and forged initials of an issuing employee.[1] The parcel was eventually delivered to the addressee in Baltimore and subsequently seized by postal inspectors pursuant to a search warrant.

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1. It was stipulated that these money orders had been stolen over a year previously in two separate robberies of a post office in Buellton, California.

The second parcel, also mailed the latter part of August, 1970, to the same addressee, was opened in Baltimore by postal inspectors who found approximately 1,141 grams of marihuana packed in two cracker cans. This parcel was also delivered to the Baltimore address and seized pursuant to a search warrant.

Prior to trial Bluett made an appropriate motion to sever the five counts relating to the stolen money orders from the three counts relating to marihuana. The grounds alleged were that counts 1 - 5 were improperly joined with counts 6 - 8 in violation of Rule 8(a) of the Federal Rules of Criminal Procedure. Bluett contended that he would be prejudiced by the admission of evidence under the money order counts which would not be admissible under the marihuana counts, and vice versa, and that under these circumstances a trial on all eight counts would make it impossible for him to receive a fair trial.

By its terms, permissive joinder of offenses under Rule 8(a) is proper if any one of three tests are satisfied: (1) the offenses must be the same or of similar character, (2) they must be based on the same act or transaction, or (3) they must be based on two or more transactions connected

together or constituting parts of a common scheme or design. Courts have generally encouraged broad interpretation of this rule in favor of at least initial joinder, a policy dictated by considerations both of fairness to the defendant and of efficient administration of criminal trials. See, e.g. United States v. Friedman, 445 F.2d 1076 (9th Cir.) cert. denied, 404 U.S. 958 (1971); Tillman v. United States, 406 F.2d 930 (5th Cir.) vacated on other grounds, 395 U.S. 830 (1969). In light of this broad construction we think joinder was proper. By the very nature of the events surrounding the alleged crimes, the government was obliged to introduce evidence showing that the crimes associated with counts 1-5 disclosed a plan, pattern and modus operandi similar in many respects to those charged in counts 6-8, since common to all counts in the indictment was Bluett's alleged scheme to send the money orders and marihuana to an address in Baltimore upon leaving Vietnam. It was undisputed that both parcels were mailed at approximately the same time and it was an essential element of the government's case to prove that Bluett knew of their illegal contents. See United States v. Browning, 390 F.2d 511 (4th Cir. 1968). Moreover, even if separate trials were required the evidence showing that one parcel contained contraband would be admissible in the trial concerning contraband in the other in order to show

an intent to violate the laws in question. See United States v. Weber, 437 F.2d 327 (3rd Cir. 1970); Wigmore, Evidence §304 (1940). Hence evidence of each of Bluett's alleged crimes was relevant to prove the other since each tended to demonstrate his plan to ship contraband into the United States and his motive for doing so, the results of which were the several crimes charged. We think, therefore, the district court's decision not to sever the counts was well within the requirements and spirit of Rule 8(a).

Bluett argues that assuming proper joinder under Rule 8(a), joinder was nevertheless prejudicial within the meaning of Rule 14. See Drew v. United States, 331 F.2d 85, 87 (D.C. Cir. 1964). In order to prevail on this argument Bluett must make an affirmative showing that the district court abused its discretion when it refused to sever the money order counts from the marihuana counts. Cantaneo v. United States, 167 F.2d 820 (4th Cir. 1948); United States v. Barrow, 363 F.2d 62, 67 (3rd Cir. 1966), cert. denied, 385 U.S. 1001 (1967). We find no affirmative evidence in the record showing the existence of prejudice and, therefore, the district court did not abuse its discretion. Bluett asserts that he was prejudiced because (1) the existence of several counts tended

to cumulate the evidence and thus the jury considered one crime as corroboration of the other; and (2) he desired to testify to the marihuana counts but not with respect to the money order counts. These arguments are not persuasive. Even though the transactions charged were separate crimes, they were so related that we cannot say that the court's insistence that they be tried together was a denial of a fair trial. See United States v. Stringi, 378 F.2d 896 (3rd Cir. 1967) cert. denied, 389 U.S. 386 (1967). The fact that the jury found him not guilty on the marihuana counts supports the conclusion that the jury did not consider one count as corroboration for the others. See Gornick v. United States, 320 F.2d 325 (10th Cir. 1963).

Nor does the fact that Bluett claims he would have testified only on the marihuana counts had there been two trials instead of one demonstrate that the district court abused its discretion. The rule in Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964), that "[p]rejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence * * *," does not apply to the circumstances of this case. (emphasis added). As was later stated by the Cross court, the controlling factor in that case was the cross-

examination of the defendant "concerning his generally tawdry way of life and his prior convictions." Baker v. United States, 401 F.2d 958, 977 (D. C. Cir. 1968) cert. denied, 400 U.S. 965 (1970). Here, however, Bluett does not claim that he faced impeachment or other questions tending to show bad character. Nor was Bluett faced with the possibility of being examined concerning prior convictions, since he had no prior criminal record. In short, we cannot find where Bluett was confounded or embarrassed in any way by the single trial of the eight counts.

Bluett next complains that the district court erred in denying his motion to suppress the evidence found on inspection of the money order parcel by a customs inspector without a search warrant. In support of this contention he asserts that mail coming into the United States is subject to the fourth amendment prohibition against unreasonable searches and seizures and, therefore, only a person holding a search warrant authorized by law may validly open or inspect a parcel. Cf. Mapp v. Ohio, 367 U.S. 643 (1961). There is no merit to this argument. It is undisputed that Bluett chose to send the parcels under fourth-class mail. By regulation "[m]ailing of sealed parcels at the fourth-class rate of postage is deemed

to be the consent of the sender to postal inspection of the contents." 39 C.F.R. § 25.7. See also, 39 U.S.C. § 4057; Santana v. United States, 329 F.2d 854 (1st Cir. 1964). Such searches are a reasonable protection of the national interest and of the collection of duties. See Boyd v. United States, 116 U.S. 616, 623 (1886). Additional justification for the search may be found in the fact that this was material entering the country. See United States v. Beckley, 335 F.2d 86 (6th Cir. 1964), cert. denied, 380 U.S. 922 (1965); 39 C.F.R. 61.1.

Bluett's arguments relating to the failure of the district court to grant a motion of acquittal are also without merit and we affirm the conviction.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1367

FILED
April 4, 1973

United States of America,

Appellee,

versus

David E. Bluett,

Appellant.

Appeal from the United States District Court for the District of Maryland at Baltimore.

ORDER

Bluett's petition for rehearing and/or modification of opinion and/or suggestion for rehearing en banc is denied since we find no question raised that was not considered before. However, since Bluett seems to be of the opinion that this Court has overlooked certain of his arguments, we will comment on them here.

Bluett claims that in connection with the postal money order charges, he could have been charged only with violation of the particular statute concerning money orders, 18 U.S.C. § 500; not those statutes concerning United States securities and obligations, 18 U.S.C. §§ 472 and 473. In support of this claim, Bluett cites Kniess v. United States, 413 F.2d 752 (9th Cir. 1969), which was not mentioned in our opinion.

Although we were aware of Kniess, we did not include

mention of it since we considered it inapplicable. Kniess' criminal conduct included passing and uttering forged postal money orders in a number of states. In all but one of these states, indictments were returned charging violations of § 500. In Washington, however, he was indicted for passing counterfeit securities of the United States in violation of § 472.

Counts one, two and three against Bluett do not charge him with passing forged or counterfeit money orders. Counts one and two charged violations of § 472 by (1) illegally bringing such forged obligations into the United States, and (2) illegally possessing and concealing them. Count three charged violation of § 473 by illegally exchanging, transferring, receiving and delivering these items. Specifically the items were stolen postal money orders.

In Kniess the Ninth Circuit ruled that it was improper to prosecute Kniess under § 472 (passing forged securities) for the criminal activity of passing forged postal money orders when there was another statute, § 500, that specifically dealt with this activity - passing forged postal money orders. Both § 472 and § 500 proscribed the illegal activity of passing but § 500 was more specific in its application to postal money orders.

But the statutory overlap present in Kniess is absent here. Passing is only one of the illegal activities proscribed by § 472 - bringing such items into the United States and possessing or concealing them are among the others. Similarly § 473 proscribes "dealing" in forged United States obligations in various ways, including receiving or delivering them.

Where §§ 472 and 473 prohibit certain activities relating to forged obligations, so does § 500 prohibit various activities relating to forged money orders. Yet among the activities mentioned in § 500, significantly missing are the specific activities of bringing them into the United States, possessing or concealing them, and receiving or delivering them. Had the government sought to charge Bluett with violation of § 500 for the activities alleged in counts one, two and three, it appears such an indictment would have failed for not alleging activity proscribed by the statute. While § 500 deals exclusively with postal money orders, its portions do not deal with the specific criminal activities of Bluett; portions of §§ 472 and 473 do, however. This is why prosecution under §§ 472 and 473 was correct.

Bluett also claims that the trial court erred in failing to give certain instructions to the jury; specifically, the theory offered for acquittal. After rereading the charge given, we are still of the opinion that the charge, taken as a whole, adequately instructed the jury of the necessary criminal intent required for conviction. Bluett's acquittal on the marijuana possession charges confirms this.

As to the other arguments raised by Bluett in his petition, these have already been adequately answered in our original opinion.

/s/ Chief Judge, Fourth Judicial Circuit

/s/ United States Circuit Judge

/s/ United States Circuit Judge

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES INVOLVED

Title 18 U.S.C. Section 2

Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands induces or procures its commission is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U S.C. Section 3

Accessory After The Fact.

Whoever knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

Title 18 U.S.C. Section 8

Obligation Or Other Security Of The United States Defined.

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

Title 18 U.S.C. Section 471

Obligations Or Securities Of United States.

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Title 18 U.S.C. Section 472

Uttering Counterfeit Obligations Or Securities.

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Title 18 U.S.C. Section 473

Dealing In Counterfeit Obligations Or Securities.

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Title 18 U.S.C. Section 500

Money Orders.

Whoever, with intent to defraud, falsely makes, forges, counterfeits, engraves, or prints any order in imitation of or purporting to be a money order issued by the Post Office Department, or by any postmaster or agent thereof; or

Section 500, Title 18 U.S.C. (cont'd)

Whoever forges or counterfeits the signature of any postmaster, assistant postmaster, chief clerk, or clerk, upon or to any money order, or postal note, or blank therefor provided or issued by or under the direction of the Post Office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorsement thereof, or any material signature to any receipt or certificate of identification thereof; or

Whoever falsely alters in any material respect, any such money order or postal note; or

Whoever, with intent to defraud, passes, utters or publishes, any such forged or altered money order or postal note, knowing any material signature or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or

Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any officer, employee, or agent thereof, any sum of money whatever; or

Whoever, with intent to defraud the United States or any person, transmits or presents to any officer or employee, or at any office of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to any material indorsement, receipt, or

Section 500, Title 18 U S.C. (cont'd)

certificate thereon, or material alteration therein unlawfully made, or to have been unlawfully issued without previous payment of the amount required to be paid upon such issue ---

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. Section 542

Entry Of Goods By Means Of False Statements.

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any wilful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement or affected by such act or omission ---

Section 542, Title 18 U.S.C. (cont'd)

Shall be fined for each offense not more than $5,00 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States," as used in this section, shall not include commerce with the Philippine Islands, Virgin Island, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

Title 18 U.S.C. Section 641

Public Money, Property Or Records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted ---

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

FEDERAL RULES OF CRIMINAL PROCEDURE APPLICABLE

Rule 8. Joinder Of Offenses And Of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief From Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Filed March 15, 1973

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,

Appellee,

vs.

David E. Bluett,

Appellant

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed.

/s/ William K. Slate, II
Clerk

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1629

DAVID E. BLUETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1-8) is not reported; the order denying a petition for rehearing and other relief (Pet. App. 9-11) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20) was entered on March 15, 1973; an order denying a petition for rehearing and other relief was issued on April 4, 1973. By order of May 10, 1973, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including June 4, 1973, and the petition was filed on that date.

QUESTIONS PRESENTED

1. Whether a postal money order is an "obligation or other security of the United States" for purposes of 18 U.S.C. 472-473.

2. Whether the jury was properly instructed on the issue of intent.

3. Whether evidence was seized in violation of the Fourth Amendment.

4. Whether the trial court properly denied the motion to sever offenses.

5. Whether venue lay in the District of Maryland, where petitioner was tried.

6. Whether the jury's verdict must be set aside as inconsistent.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of importation, possession, concealment, transfer, receipt, and conversion of forged money orders, and of aiding and abetting, in violation of 18 U.S.C. 472, 473, 641, and 2[1] (App. 5-12, 45).[2] He was committed to the custody of the Attorney General for study and report pursuant to 18 U.S.C. 4208(b). Sentence was thereafter suspended and petitioner was placed on probation for a period

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[1] Petitioner was acquitted on one count charging that he obtained the entry of the money orders by false statements on a customs form and on three counts charging the importation, concealment, and introduction into commerce of marijuana.

[2] "App." denotes the Appendix on appeal; "Tr." denotes the reporter's transcript of petitioner's trial in the district court, excerpts of which appear at App. 99-206.

of three years (App. 46-46A). The court of appeals affirmed (Pet. App. 1-8).

While in Vietnam, petitioner mailed two parcels from Saigon to a Mr. and Mrs. Deily in Maryland. The first of these (the "money order" parcel) was opened on October 2, 1970, by a customs examiner at Oakland, California, in the course of his usual duties. The examiner discovered 188 United States postal money orders, which had been stolen in blank from the Buellton, California post office in 1969. The money orders when found each bore a forged money order machine imprint, punch, and validation stamp in the amount of $100, a forged issuing officer's stamp,[3] and the forged initials of an issuing clerk (App. 25-27). Following delivery to United States postal inspectors in Baltimore, Maryland, who reopened the package to verify the statements of the customs officials, the money order parcel was delivered on October 14, 1970, to the addressees. A search warrant was obtained on that date for the parcel (App. 50-52), which was then seized.

The second parcel (the "marihuana" parcel), also addressed to the Deilys, was inspected by postal inspectors in Baltimore, Maryland, on October 19, 1970, and was found to contain approximately two and a half pounds of marihuana packed in two cracker cans (App. 27). This package was also delivered to the addressees and then seized pursuant to a search warrant (App. 53-55).

At trial, petitioner testified that he had mailed a number of parcels to Mr. and Mrs. Deily, including the two here at issue, from Saigon, South Vietnam, in the latter part of August 1970, while he was preparing

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[3] "Army and Air Force Postal Service, APO San Francisco, California 96309."

to move from Saigon to the United States. He stated that these parcels were packed either by himself, a Miss Hoa, or professional packers (Tr. 225-231).

Mrs. Deily testified that she and her husband had agreed to accept petitioner's parcels from Vietnam and hold them for petitioner to pick up on his return. In fact, petitioner did stop by their home to pick up several of his packages (Tr. 89-91).

ARGUMENT

1. Petitioner's contention, first raised on appeal, that United States postal money orders are outside the definition of "obligation or other security of the United States" within the intendment of 18 U.S.C. 472 and 473, is erroneous. The plain language of those sections and of 18 U.S.C. 8 (which defines the term "obligation or other security of the United States") clearly covers postal money orders. Although the Ninth Circuit concluded in *Kniess* v. *United States*, 413 F. 2d 752, that a prosecution for passing forged postal money orders would not lie under 18 U.S.C. 472, but only under 18 U.S.C. 500, that case involved conduct which was clearly within 18 U.S.C. 500, and the court concluded that the lesser penalties provided therein should therefore control, despite the literal applicability of 18 U.S.C. 472.[4] Here, as the court below correctly noted, the offenses charged lie only under 18 U.S.C. 472 and 473 (Pet. App. 9-11). There is no indication in the legislative history of either the counterfeiting or the money order provisions that Congress intended that 18 U.S.C. 500 should be the exclusive penalty applicable to all

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[4] Petitioner's sentence here, unlike that of the defendant in *Kniess*, was less than the maximum provided in 18 U.S.C. 500.

illicit transactions involving postal money orders.[5] Therefore, regardless of the correctness of the conclusion in *Kniess* when the conduct involved is prohibited by both statutes, it is clear that 18 U.S.C. 500 does not bar the applicability of 18 U.S.C. 472 and 473 to conduct which is not within its narrower scope.[6]

2. Petitioner's complaint regarding the jury instructions is without merit. The jury was instructed that the elements of each offense of which petitioner was subsequently convicted required the government to prove that petitioner acted with the specified illicit intent, including the intent to defraud (Tr. 642, 645, 649; App. 164, 167, 171). It was further instructed that "[t]o act with intent to defraud means to act wilfully and with the specific intent to deceive or cheat * * *" (Tr. 652; App. 174) and that "[a]n act or a failure to act is wilfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids, or to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or disregard the law" (*ibid.*).

These instructions clearly explained to the jury that petitioner could not be convicted if the jury believed

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[5] Indeed, Congress has specifically recognized the applicability of 18 U.S.C. 641, dealing with stolen public property, to money order offenses. S. Rep. No. 92-1074, 92d Cong., 2d Sess. Petitioner was convicted on count five of the indictment of violations of 18 U.S.C. 641; petitioner's argument based on *Kniess* does not affect that conviction.

[6] Cf. *United States* v. *Jacek*, 196 F. Supp. 152 (W.D. Pa.), affirmed, 298 F. 2d 429 (C.A. 3), certiorari denied, 370 U.S. 952, in which the defendant was sentenced under 18 U.S.C. 473 for receipt of forged postal money orders with intent to defraud, and under 18 U.S.C. 500 for forgery of postal money orders.

his defense that he was ignorant of the contents of the money order package. Contrary to petitioner's contentions (Pet. 15), they did not permit conviction on a finding that petitioner was "negligent or careless in failing to check the package before the mailing."

3. Petitioner claims that the opening and inspection of the money order parcel in California constituted an unreasonable search and seizure in violation of his Fourth Amendment rights. But the right of customs officials to search persons and things coming into this country without a search warrant or probable cause has long been recognized. Such border searches are not unreasonable and are thus "not embraced within the prohibition of the [Fourth] Amendment." *Boyd* v. *United States,* 116 U.S. 616, 623; see also *Carroll* v. *United States,* 267 U.S. 132, 153. More recently, this Court held in *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 376:

> * * * [A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. * * *

The same right to exclude illegal articles justifies warrantless searches of packages sent into the country through the mails. *United States* v. *Beckley,* 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Galvez,* 465 F. 2d 681, 687 (C.A. 10).

4. The district court's refusal to sever the money order counts from the marihuana counts was proper. The record is clear that petitioner mailed the two parcels at approximately the same time as parts of a common scheme—namely, to bring contraband into the country in his personal belongings in the course of his return from Saigon. Rule 8(a), Fed. R. Crim. P., provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or on *two or more acts or transactions connected together or constituting parts of a common scheme or plan.* [Emphasis supplied.]

Had the money orders and the marihuana been packed in the same carton, there could be no doubt that the offenses charged arose from the same transaction; the fact that they were mailed in separate packages, but from the same place, to the same place, and at nearly the same time, does not justify a different result. In addition, the defense of which petitioner claims he was deprived was that the money orders were mistakenly packed in his belongings by Miss Hoa. Thus, it was relevant to show that petitioner, while moving his belongings to this country, was putting various contraband items into his parcels as part of a general plan.

5. Petitioner's contention that venue did not lie in the District of Maryland is not properly before this Court, since the question of venue was never raised in the district court. Under such circumstances, petitioner is deemed to have waived objection to venue. *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *Gilbert* v. *United States*, 359

F. 2d 285 (C.A. 9), certiorari denied, 385 U.S. 882; *United States* v. *Gross*, 276 F. 2d 816 (C.A. 2), certiorari denied, 363 U.S. 831; *United States* v. *Jones*, 174 F. 2d 746 (C.A. 7).

In any event, venue was properly laid in Maryland, since the evidence was sufficient to prove petitioner had constructive possession of the money orders in Maryland. Mrs. Deily testified that the parcel containing the money orders was delivered to her home on the understanding that she would hold it for petitioner to pick up; indeed he had picked up other such packages (Tr. 88-90). Petitioner thus met the test for constructive possession by "knowingly having both the power and intention at a given time to exercise dominion or control over the property." *United States* v. *Cousins*, 427 F. 2d 382, 384 (C.A. 9).

6. Finally, petitioner's contention that the jury's verdict is inconsistent because he was acquitted on count four but convicted on the other counts involving the money orders is not well founded. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment [citations omitted]." *Dunn* v. *United States*, 284 U.S. 390, 393.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.